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No. -

IN THE

Supreme Court of the United States

October Term, 1984

TODD PACIFIC SHIPYARDS AND,
THE AETNA CASUALTY AND SURETY COMPANY
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION
PROGRAMS UNITED STATES
DEPARTMENT OF LABOR,
Respondent

and

ELBRIDGE STEVENS, III,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN W. SCHEDLER, ESQ.
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QUESTION PRESENTED FOR REVIEW

In a Longshoremen's and Harbor Workers' claim for disability due to sarcoidosis, should the presumption of compensability in Section 20(a) of the Act, 33 U.S.C. § 920(a) be applied when the employer has presented substantial evidence that sarcoidosis is not related to the claimant's employment?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Todd Pacific Shipyards, Aetna Casualty and Surety Company, Elbridge Stevens, III, and the Director, Office of Worker Compensation Programs, U.S. Department of Labor.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

A. Decision and Order by Administrative Law Judge Steven E. Halpern dated November 21, 1979: Granting Elbridge Stevens, III a Longshoremen's and Harbor Workers' claim for employment-related sarcoidosis.

B. Decision by Benefits Review Board dated January 18, 1982, affirming the ruling of the Administrative Law Judge, with one member dissenting.

C. Memorandum Decision, United States Court of Appeals for the Ninth Circuit, Cause No. 82-7148, filed November 9, 1983, affirming the Benefits Review Board.

D. Order, United States Court of Appeals for the Ninth Circuit, Cause No. 82-7148, filed January 26, 1984 Denying Petition for Rehearing and Rejecting Suggestion for Rehearing en Banc.

STATEMENT OF JURISDICTIONAL GROUNDS

A. Judgment was entered and filed by the United States Court of Appeals for the Ninth Circuit on November 9, 1983.

B. Order denying a Petition for Rehearing and Rejecting the Suggestion for Rehearing en Banc was filed on January 26, 1984.

C. Jurisdiction is conferred on the Court by Title 28 U.S.C. § 2101(c) permitting a writ of certiorari from a judgment of the Court of Appeals taken or applied for within ninety (90) days after the entry of such judgment. Jurisdiction is also provided under Rule 17.1(c) of the Rules of the Supreme Court.

STATUTES

33 U.S.C. §920 *Presumption:*

> In any proceeding for the enforcement of a claim for compensation under this Act, it shall be presumed, in the absence of substantial evidence to the contrary
>
> (a) That the claim comes within the provisions of this Act

***

STATEMENT OF THE CASE

Elbridge F. Stevens, III, claimant and respondent herein, worked as a grinder/burner for Todd Pacific Shipyards (hereinafter "Todd"), petitioner. In March of 1978, Stevens became ill and was diagnosed as suffering from a systemic disease known as sarcoidosis. Stevens filed a claim against Todd under the Longshoremen's and Harbor Workers' Compensation Act and an administrative hearing was held on the claim in October of 1979. Todd submitted the testimony of three pulmonary specialists each of whom testified that the cause of sarcoidosis was unknown. Each pulmonary specialist also expressed the opinion based upon reasonable medical certainty that there was no relationship between Stevens' disease and his employment at Todd. Mr. Stevens did not present any medical testimony whatsoever linking his sarcoidosis to his employment at Todd.

The Administrative Law Judge disregarded the medical evidence, invoked the presumption of 33 U.S.C. § 920(a), and ordered compensation for permanent disability due to sarcoidosis. This ruling was affirmed by the Benefits Review Board in a two to one Decision dated January 18, 1982. The Decision of the Benefits Review Board was upheld on appeal to the United States Court of Appeals for the Ninth Circuit in a Memorandum Opinion filed on November 9, 1983. A Petition for Rehearing with a Suggestion for Rehearing en banc was denied by an Order filed January 26, 1984.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jurisdiction for review of the Decision and Order of the Benefits Review Board by the United States Court of Appeals for the Ninth Circuit was estabished by 33 U.S.C. § 921(c).

ARGUMENT

A. Invoking the Presumption of Compensability in 33 U.S.C. § 920(a) in the Face of Substantial Evidence to the Contrary Directly Conflicts with the Supreme Court's Decision in *Del Vecchio v. Bowers*.

The presumption of compensability created by 33 U.S.C. § 920(a) is rebuttable by substantial evidence to the contrary. The purpose of the presumption is to control the result of a compensation claim only where there is an entire lack of competent evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). Once the employer submits substantial evidence tending to rebut the presumption, it falls from the case and cannot control the result. *Del Vecchio v. Bowers*, *supra*. Furthermore, if the employer alone adduces evidence which tends to support its theory that the claim does not come within the provisions of the Act, the case must be decided upon that evidence. *Del Vecchio v. Bowers*, *supra*.

The testimony of the three pulmonary specialists, whether believed by the trier of fact or not, surely was substantial evidence rebutting the presumption. The presumption of compensability must, therefore, fall out of the case. The Courts below improperly used the presumption as affirmative evidence directly in conflict with the Supreme Court's ruling in *Del Vecchio v. Bowers*, *supra*.

B. The Courts Below Used the Mere Existence of a Physical Impairment as a Basis for Shifting the Burden of Proof to the Employer, Contrary to the Supreme Court's Mandate *U.S. Industries/Federal Sheet Metal, Inc., et al. v. Director, OWCP, et al.*

The mere existence of a physical impairment is insufficient to shift the burden of proof to the employer [i.e., invoke the § 920 Presumption]. *U.S. Industries/Federal Sheet Metal, Inc., et al. v. Director, Office of Worker Compensation Programs, et al.*, 455 U.S. 608 (1982). The fact that "something unexpectedly goes wrong with the human frame" does not establish an "injury' within the meaning of the Act. For an injury to be compensable under this Act, it must arise both "out of" *and* "in the course of" the covered employment.

The requirements are conjunctive and both must be met in order for a claim to be compensable. 33 U.S.C. § 902(2); *U.S. Industries, supra.*

In this case, there is not even a scintilla of competent evidence suggesting that Stevens sarcoidosis either arose "out of" or "in the course of" his employment. Virtually all that is established is that he has a disease called sarcoidosis.

In marked contrast, however, three board certified pulmonary disease specialists, including Stevens' treating physician, testified that Stevens' sarcoidosis was not related to his employment. In the circumstances, one can only conclude that the courts below have assumed that the mere existence of a disease is sufficient to make out a claim under the Longshoremen's and Harbor Workers' Compensation Act. This is manifestly not the law and contrary to the explicit policy set forth by the Supreme Court.

C. The Decision of the Court Below has Created a Conflict in the Circuit Courts of Appeal Which Demands Resolution.

Regarding what evidence is sufficient to rebut the presumption, the First Circuit of the United States Court of Appeals has held that the term "substantial evidence" means more than a scintilla but less than a preponderance. *Sprague v. Director, Office of Worker Compensation Programs, et al.*, 688 F.2d 862 (1st Cir. 1982). On the other hand, by its decision below, the Ninth Circuit has made it clear that the term "substantial evidence" means far more. The Court below has sanctioned the invocation of the presumption in the face of the firm testimony of three board certified pulmonary disease specialists to the contrary. The Ninth Circuit has held that the term "substantial evidence", as it applies to the presumption at 33 U.S.C. § 920, means "clear, cogent, and convincing." The Ninth Circuit's application of the presumption essentially makes it irrebuttable.

In the foregoing circumstances, employers are now confronted with a confusion of precedent and inconsistent standards under which they must work. Moreover, the insurance carriers must now consider risks within the Ninth Circuit

under much different terms than risks which arise under the First Circuit. This is precisely the turn of events the Longshoremen's and Harbor Workers Compensation Act was designed to preclude.

D. This Court Has Never Interpreted the Meaning of the Presumption at 33 U.S.C. § 920(a) and the Substantial Deviations by the Courts Below From the Supreme Court's Policy Now Require the Court's Attention.

The purpose of the presumption at 33 U.S.C. § 920(a) was to relieve an injured employee from a perhaps bothersome burden in cases where coverage is uncontested. It was never intended to provide life or disability insurance, however, for covered employees. Cf. *U.S. Industries*, *supra*. Indeed, some courts still view it in that light. Cf. *Sprague*, *supra*. Unfortunately, many courts now view the presumption at 33 U.S.C. § 920(a) as an invitation to perform an intellectual exercise granting benefits to claimants having a disease without serious regard to whether that disease bears any rational relationship to the work environment. While it is true that much disease results from employment, it is equally true that much disease does *not* arise out of employment, either. The court in *U.S. Industries*, and its footnotes, set forth an apt quote:

> No amount of informality can alter the elementary requirement that the claimant allege *and prove* the substance of all essential elements of his case. (Emphasis added)

3 A. Larson, *The Law of Workman's Compensation*, § 78.10, at 15-12.

At this juncture, counsel in the shipbuilding industry need guidance. At the court below has interpreted the § 920 presumption, any one whose employment is covered under the Longshoremen's and Harbor Worker's Compensation Act and who suffers from a disease whose causation is open to question would be entitled to benefits. In these circumstances, the requirement that the condition both "arise out" and "occur in the course of" one's employment have become meaningless. All claimant must do is prove that he or she is sick. In short, as currently interpreted in the Ninth

Circuit, the Longshoremen's and Harbor Worker's Compensation Act has simply become another species of health and disability insurance. This is directly in conflict with the clear policy of this court. See *U.S. Industries, supra* at footnote 10.

CONCLUSION

The § 920 presumption was invoked on the basis of mere physical impairment alone and in the face of persuasive evidence to the contrary. The decision of the Court below conflicts with that of another circuit and the clear mandate of the Supreme Court. Substantial confusion concerning the meaning and scope of § 920 presumption now exists and only the Supreme Court can resolve the confusion.

Petitioners therefore respectfully pray that their Petition for Writ of Certiorari be granted.

Respectfully submitted this 26th day of April, 1984.

JOHN W. SCHEDLER, ESQ.
LEE, SMART, COOK MARTIN & PATTERSON, P.S., INC.
Counsel for Petitioner Todd Pacific Shipyards and The Aetna Casualty and Surety Company

APPENDIX A

STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE COMPANIES OF APPELLANTS TODD PACIFIC SHIPYARD CORPORATION AND AETNA CASUALTY AND SURETY COMPANY

I. AETNA CASUALTY AND SURETY COMPANY

Aetna Casualty and Surety Company is wholly owned by Aetna Life and Casualty Company, a stock holding company.

The following companies are affiliated with Aetna Casualty and Surety Company:

1. Aetna Life Insurance Company;
2. The Standard Fire Insurance Company;
3. Aetna Life Insurance and Annuity Company;
4. SPAN Data Processing Center, Inc.;
5. Automobile Insurance Company of Hartford, Connecticut;
6. Aetna Financial Services, Inc.;
7. Aetna Technical Services, Inc.;
8. Aetna Capital Management, Inc.;

9. Aetna Life Insurance Company of Illinois;
10. Aetna Casualty and Surety Company of Illinois;
11. Aetna Casualty and Surety Company of America;
12. Aetna Diversified Technologies;
13. Aetna Telecommunications Laboratories;
14. Aetna Telecommunications Consultants.

II. TODD SHIPYARDS CORPORATION

Todd Shipyards Corporation is the parent corporation of Todd Pacific Shipyards Corporation.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD PACIFIC SHIPYARDS and AETNA CASUALTY & SURETY COMPANY, Petitioners,	)	NO. 82-7148
vs.	)	ORDER
ELBRIDGE STEVENS III, and DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, Respondents.	)	

Before: HUG, POOLE, and NORRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD PACIFIC SHIPYARDS and AETNA CASUALTY & SURETY COMPANY, Petitioners,	)	
vs.	)	NO. 82-7148
ELBRIDGE STEVENS III, and DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, Respondents.	)	MEMORANDUM

Petition for Review of Order of the Director of Office of Workers Compensation Program for the Western District of Washington

Argued and submitted April 7, 1983

Before: HUG, POOLE, and NORRIS, Circuit Judges.

Petitioners argue that the Administrative Law Judge erred in according respondent Stevens the benefit of the presumption under section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 920(a) (1970). Petitioners rely on U.S. Industries/Federal

Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608 (1982), which held that the section 20(a) presumption cannot apply to a claim that the employee did not assert or to an injury that did not arise in the course of employment. Here Stevens asserted a claim for compensation for an illness, sarcoidosis, he had developed due to his work with pipefitters at the shipyards. Stevens then build [sic] his prima facie case around this claim. He proffered evidence that he had not had any breathing problems prior to his work in the shipyards, and that in the course of his work he was exposed to relatively high concentrations of industrial dust particles of diverse identified and unidentified substances. He also showed that the dust was harmful, though the cause of his condition could not be isolated. Thus the Administrative Law Judge did not err in

applying the statutory presumption to a claim which was "fairly supported by the existing claim [and] by evidentiary record," id. at 613 n.7, and which "alleged . . . facts that would establish that [the claimant] suffered an injury that arose in the course of employment," id. at 616.

Alternatively, petitioners contend that they proffered substantial evidence to rebut the section 20(a) presumption. Three doctors testified that they could not say, with a reasonable amount of medical certainty, that the pollutants in the workplace caused Steven's illness. Yet they also could not say tht the pollutants had not caused the sarcoidosis. Moreover, though one of the doctors indicated that beryllium and zirconium were metals believed to cause the disease, petitioners failed to produce evidence that fragments

of these metals were not present in the industrial dust breathed by the claimant. The Administrative Law Judge's decision that petitioners did not proffer sufficient evidence to rebut the presumption was therefore not "irrational or without substantial evidence on the record as a whole," O'Keefe v. Smith, Hinchman & Grylls Assoc., 380 U.S. 359, 363 (1965).

AFFIRMED*

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

APPENDIX D

BENEFITS REVIEW BOARD

U.S. DEPARTMENT OF LABOR

NO. 79-731

ELBRIDGE STEVENS, III Claimant-Respondent, v. TODD PACIFIC SHIPYARDS and AETNA CASUALTY & SURETY COMPANY, Employer/Carrier-Petitioners.	)	DECISION and ORDER

Appeal from the Decision and Order of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Larry Meyers, Seattle, Washington, for the claimant.

Russel A. Metz (Lee, Smart, Cook, Biehl & Martin, P.S.,Inc.), Seattle, Washington, for the employer/carrier.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

MILLER, Administrative Appeals Judge:

This is an appeal by Todd Pacific Shipyards and its insurance carrier, Aetna

Casualty & Surety Company (hereinafter jointly referred to as employer) from the Decision and Order (79-LHCA-1818-S) of Administrative Law Judge Steven E. Halpern pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (hereinafter, the Act). Employer appeals the administrative law judge's finding that claimant's disease, sarcoidosis, is causally related to claimant's employment.

In performance of his duties as a grinder/burner for employer, claimant was exposed to high concentrations of various industrial dust particles. On October 13, 1978, claimant was forced to terminate his employment with employer due to the combined effects of sarcoidosis and industrial brochitis.

At the hearing before the administrative law judge to determine claimant's entitlement to compensation, Judge Halpern invoked the presumption contained in Section 20(a) of the Act, 33 U.S.C. §920(a), in determining whether claimant's sarcoidosis was causally related to his employment. 1/ Finding that the record was "devoid" of substantial evidence on the issue of the specific cause of claimant's carcoidosis, the administrative law judge held that the presumption was controlling

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1/ Section 20(a) provides that:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary -
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. §920(a)

in the instant case. Therefore, he concluded that claimant's sarcoidosis was causally related to his employment. Employer now appeals the administrative law judge's finding that the Section 20(a) presumption was not rebutted.

Initially, we note that the Board's scope of review is limited. Consequently, we must affirm the Decision and Order of the administrative law judge if it is supported by substantial evidence in the record considered as a whole, not irrational, and in accordance with law. 33 U.S.C. § 921(b)(3); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In the instant case, the medical evidence indisputably establishes that claimant is suffering from the effects of sarcoidosis. Therefore, the administrative law judge properly invoked the Section

20(a) presumption in finding that claimant's sarcoidosis was causally related to claimant's employment. See Parsons Corp. of California v. Director, OWCP, 12 BRBS 234, 235 n.2, 619 F 2.d 38, 40 (9th Cir. 1980), aff'g Gunter v. Parsons Corp., 6 BRBS 607 (1977). Accordingly, the issue is whether the evidence supports the admimistrative law judge's conclusion that employer failed to introduce substantial evidence to rebut this presumption.

All of the medical evidence in the record indicates that sarcoidosis is a disease of unknown etiology which to a large degree involves the immunological system, although it is a multi-system disease. 2/ Since the etiology of sarcoidosis is unknown, employer was unable to

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2/ Dr. John Sproul, the only physician to testify at the hearing, and Drs. Terry Rogers and Jeffrey Cary, who both testified by deposition, all agreed that sarcoidosis

identify a source other than claimant's employment as cause of claimant's sarcoidosis. However, proof of another agency of causation is not always necessary to rebut the Section 20(a) presumption. Carver v. Potomac Electric Power Co., 8 BRBS 43 (1978). In the instant case, employer sought to rebut the presumption by negating any potential relationship between sarcoidosis and claimant's industrial exposure. Although such negative evidence may rebut the presumption in the appropriate cases, see Swinton v. J. Frank Kelly, Inc., 4 BRBS 466, 554 F.2d 1075 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976), we must conclude that this evidence was not sufficient to do so in this case.

(footnote 2 continued)

was a disease of unknown etioloty. See Hearing Transcript at 113; Deposition of Dr. Terry Rogers at II; Deposition of Dr. Jeffrey Cary at 10-11.

Dr. Sproul, the only physician to directly opine that claimant's disease was not related to his employment, explicitly based his opinion on the fact that there was no known cause for sarcoidosis. Hearing Transcript at 100. The other medical evidence in the record attempted to negate any possible relationship by indicating that sarcoidosis occurred in the general population and/or that sarcoidosis was known to occur without exposure to industial pollutants. See Hearing Transcript at 100; Deposition of Dr. Terry Rogers at 17. 3/

As the factfinder, the administrative law judge is entitled to weigh the medical evidence and draw his own inferences from

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3/ When referring to some of the prevalent characteristics of sarcoidosis exposure, Dr. Jeffrey Cary failed to mention exposure to industral pollutants.

it; he is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962). Here the administrative law judge found that the medical evidence regarding the lack of a causal relationship was not based on reasonable medical certainty and was dependent on assumed facts not in evidence. Thus, he refused to find that such evidence constituted substantial evidence to rebut the presumption. Our review of the record indicates that the administrative law judge's conclusion is rational and in accordance with law. 4/

4/ As the instant case arises in the Ninth Circuit, we are bound to follow the law of that jurisdiction as announced in Parsons, 12 BRBS 234, 619 F.2d 38. Consequently, considering the paucity of evidence introduced by employer, we hold that employer failed to rebut the Section 20(a) presumption. Moreover, even if we disagreed with

Accordingly, the Decision and Order is affirmed.

JULIUS MILLER
Administrative Appeals Judge

I Concur:

ROBERT L. RAMSEY, Chief
Administrattive Appeals Judge

(footnote 4 continued)

the administrative law judge's finding that the presumption was not rebutted, the quantum of evidence submitted by employer and the fact that the employer has the ultimate burden of persuasion, would lead us to hold that even without the benefit of the presumption, employer failed to offer a preponderance of evidence to support a finding that claimant's sarcoidosis was not causally related to claimant's industrial exposure. Parsons, 12 BRBS at 236.

KALARIS, Administrative Appeals Judge, concurring in part, dissenting in part:

I respectfully but strongly dissent from the decision of my colleagues affirming the administrative law judge's finding that employer did not introduce substantial evidence to rebut the Section 20(a) presumption. Rather, after careful consideration of the record, I would hold that employer has presented substantial evidence to rebut. Moreover, after careful consideration of the entire record without the benefit of the presumption, I would hold as a matter of law that claimant's sarcoidosis is not causally related to his industrial exposure. I do, however, concur in the affirmance of the award of temporary total disability for the period from October 14, 1978 to November 20, 1978.

In the instant case, because the etiology of sarcoidosis is unknown, employer

endeavored to rebut the presumption of causation contained in Section 20(a) by negating any possible relationship between claimant's sarcoidosis and exposure to industrial pollutants and dust particles. It is well established that the Section 20(a) presumption controls the result as to causation only where there is an entire lack of competent evidence on the issue. See Del Vecchio v. Bowers, 296 U.S. 280 (1935). Moreover, as my colleagues recognize, negative evidence is sufficient to rebut the Section 20(a) presumption if this evidence is specific and comprehensive enough "to sever the potential connection between the particular injury and the job-related event." Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1083, 4 BRBS 466, 477 (1976), cert. denied, 429 U.S. 820 (1976). However, after recognizing this principle,

my colleagues proceed to ignore it as they review the evidence in this case.

Dr. John Sproul explicitly stated that it was his opinion that, "based on reasonable medical certainty," there was no relationship between claimant's sarcoidosis and his employment. Hearing Transcript at 100. Moreover, Dr. Sproul answered in the affirmative when asked whether, to his knowledge, sarcoidosis occurred without exposure to industrial pollutants, and when asked whether sarcoidosis occurred in the general population.

Dr. Terry Rogers testified in his deposition that sarcoidosis had been detected in persons "who have no known exposure to anything that we can come up with. We see secretaries, housewives, students, unemployed, employed, there seems to be no common denominator for this." Deposition of Dr. Terry Rogers at 17.

Furthermore, when referring to some of the prevalent characteristics of sarcoidosis exposure, it is noteworthy that Dr. Jeffrey Cary made no mention of exposure to industrial pollutants. Nevertheless, Dr. Cary's testimony indicates that sarcoidosis had been shown to be prevalent in the southeastern part of the United States, and there is evidence in the record which indicates that claimant previously resided in Florida. Deposition of Dr. Jeffrey Cary at 11, 30.

All of the above-cited medical evidence indicates that industrial exposure has not been implicated as a possible cause of sarcoidosis and also indicates that industrial exposure is not even a common denominator among cases of sarcoidosis. Therefore, while employer has not proved another agency for claimant's sarcoidosis, employer has presented uncontradicted evidence

that negates any causal relation between claimant's sarcoidosis and his industrial exposure. See Champion v. S. & M. Traylor Brothers, BRBS, BRB No 79-723, slip op. at 14 (June 12, 1981) (although testimony did not indicate the cause of the sarcoidosis, it was sufficient to establish that sarcoidosis was not caused by exposure to dust in the work environment). In my view, the aforementioned medical evidence consitutes competent rebuttal evidence, Del Vecchio v. Bowers, and it is eminently sufficient, as a matter of law, to sever the potential connection between the claimant's sarcoidosis and his employment. Swinton v. J. Frank Kelly, Inc. Accordingly, I would hold that employer has introduced substantial evidence to rebut the presumption of causation contained in Section 20(a).

My review of the evidence in the record also indicates that a remand to the administrative law judge for consideration to the issue of causation without the benefit of the Section 20(a) presumption is not necessary. Where the presumption has been rebutted, the issue of causation must be resolved on the whole body of proof pro and con. Del Vecchio v. Bowers. Reviewing the evidence without consideration of the presumption, it is clear that there is no evidence tending to establish that sarcoidosis is causally related to exposure to industrial pollutants or to dust particles. In fact, the claimant's medical evidence merely established that claimant was unable to continue his usual employment due to the combined effects for sarcoisosis superimposed upon a mild obstructive airway disease. On the other hand, a preponderance of the medical evidence negates the

possibility of a causal relation between claimant's sarcoidosis and his industrial exposure. Therefore, since there is no evidence that would indicate that sarcoidosis is work related, I would hold that, as a matter of law, this record does not contain substantial evidence supportive of a finding that claimant's sarcoidosis is causally related to his employment. Accordingly, any claim for compensation by claimant premised on disability due to his sarcoidosis should be denied. 1/

1/ As stated, although I would hold that there is substantial evidence to rebut the Section 20(a) presumption and that without the presumption, as a matter of law, claimant's sarcoidosis is not causally related to his employment, I wish to further note that the administrative law judge, as fact finder, could have found, on the basis of prior Board law, that claimant had failed to make out a prima facie case by failing to establish that there were circumstances at work which

However, while I would hold as a matter of law that claimant's sarcoidosis is not compensable, I nevertheless concur in the award of temporary total disability for the period from October 14, 1978 to November 20, 1978. Claimant was forced to discontinue his longshore employment on October 13, 1978, due to the combined effects of sarcoidosis and industrial bronchitis. The medical evidence indicates and the administrative law judge found that claimant's brochitis resolved soon after the termination of claimant's employment. By November 20, 1978, claimant's pulmonary functions had returned to a normal state. See Deposition of Jeffrey Cary, M.D., P. 17; EX

(footnote 1 continued)

"could" have caused his sarcoidosis. Therefore, claimant may not have been afforded the benefit of the Section 20(a) presumption. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336 (1981).

R-7. Therefore substantial evidence supports the administrative law judge's finding that claimant be compensated pursuant to the Act for the period when he was disabled due to the industrial bronchitis. See Champion, supra.

ISMENE M. KALARIS
Administrative Appeals Judge.

Dated this 18th Day of January 1982.

APPENDIX E

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

San Francisco Regional Office
Suite 600 - 211 Main St.
San Francisco, CA 94105

In the Matter of	)	
	)	
ELBRIDGE STEVENS, III	)	
	)	
Claimant	)	
	)	
v.	)	CASE NO.
	)	79-LHCA-1818-S
TODD PACIFIC SHIPYARDS,	)	
	)	OWCP NO. 14-38833
Employer	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
Carrier	)	
	)	

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For the Employer and Carrier

Before: STEVEN E. HALPERN
Administrative Law Judge

DECISION AND ORDER

Claimant in this proceeding filed a claim for disability under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., on Sepember 19, 1978 (TR. 148) and respondents duly filed a Notice of Controversion on September 22, 1978.

The evidence reveals that in the course of his covered work as a grinder/burner for Respondent, Claimant was exposed to relatively high concentrations for industrial dust particles of divers identified and unidentified substances.

In the course of said work Claimant developed a diffuse infiltrative restrictive lung disease known as sarcoidosis and, in the absence of any definitive proof that any of the inhalents to which he was subjected caused the disease, Respondents have

argued that he has failed to establish the elements required by section 2(2) of the Act:

> "The term 'injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment. . ."

There comes to Claimant's assistance, however, Section 20 of the Act which provides that his claim comes within the provisions of the Act, which presumption is rebuttable only by substantial evidence to the contrary.

In accordance with the case law developed in connection with said presumption, I must at the outset presume that Claimant's sarcoidosis arose in the course of his employment and is causally related thereto. And, from an evidentiary standpoint, the burden is upon Respondents to come forward with substantial evidence to the contrary.

Respondents' evidence in this regard is largely in the nature of medical opinions, proportedly based in reasonable medical certainty or probability, that Claimant's sarcoidosis is not related to his employment.

Respondents produced the live testimony of John Sproul, M.D., a pulmonary specialist who examined Claimant on October 5, 1979. The following excerpt summarizes his opinion, and the basis therefor, as to the relationship between Claimant's employment and his sarcoidosis:

> Q. Do you have an opinion as to reasonable medical certainty as to whether the claimant's condition of sarcoid is related to his work there at Todd Shipyards, as he gave it to you in his history?
>
> A. Yes. The opinion is that no relationship to that employ, to the sarcoidosis, is present.
>
> Q. I'm sorry. What do you base that opinion on? What is the basis for your opinion?

A. It's almost a circular argument. The fact that no known cause has been defined for this particular entity, for which it's recognized, and has been in this particular case recognized, under the microscope, and clinical course, the opinion that no relationship is based on that.

I am unable to establish a relationship if a relationship is not known.

Dr. Sproul further indicated that the metals beryllium and zirconium are causative of sarcoidosis (TR. 113, 123-4).

Jeffery Cary, M.D., Claimant's treating pulmonary specialist since September 6, 1978, was deposed by Respondents and testified in part as follows: that sardoidosis is a disease of uncertain etiology (Tr. 10); that the medical statistics don't give any clear indication of the etiology of sarcoidosis, "either in the general sense or in Mr. Steven's sense" (Tr. 12). Nevertheless, it was his opinion "based on reasonable medical certainty"

that: "I don't think that the sarcoidosis is caused by the work in the shipyard" (Tr 19).

Terry Rogers, M.D., a pulmonary specialist, who examined Claimant on February 9, 1978, was deposed by Respondents on September 28, 1979, and testified in part as follows:

> Q. Doctor, What is the usual origin of sarcoid conditions such as this?
>
> A. I wish I could tell you, I honestly don't know. Sarcoid is an intriguing clinical syndrome that is characteristic in its presentation. As alluded to before, it undoubtedly is a systemic problem which frequently involves the lungs. I think it's generally accorded that sarcoid is a process which reflects a pattern of response by the body to what may be any number of different inhaled or systemic challenges. That is, it may not have one specific etiology.
>
> Q. Is that attributed to an outside agent that's inhaled into the lungs or could it be a condition developing within the body?

A. Unfortunately, there's no proof either way. I think it would be prudent to say that the general understanding is that it most likely is due to an inhaled process of some type. But what the process is or what those processes are or agents are is simply unknown. (Tr. 10-11).

WITNESS: Do I understand your questions correctly, is his exposure to the shipyard and these environments in any way related to the development of sarcoid?

Q. Would it contribute to the existing problem?

A. I simply can't answer that question, I honestly don't know. We see people with sarcoid who have no known exposure to anything that we can come up with. We see secretaries, housewives, students, unemployed, employed, there seems to be no common denominator for this. Having said that, and you look at a young man who is 25 who has significant sarcoid and who has abnormal pulmonary function, you say, gee whiz, is there something in his environment that has stimulated this disease. The tendency is to say, oh, it must be something in there, but it's only that. And there is no way that I could in any fashion point the finger and say yes, if only he hadn't worked at the shipyard, he

wouldn't have sarcoid, I can't say that because I don't know. (Tr. 16-18).

Q. Do you have an opinion, based on reasonable medical certainty, as to whether inhalation of dust, fumes, and smoke during Mr. Steven's employment at Todd Shipyards bears a causal relationship to his diagnosed condition of sarcoidosis?

A. Yes, I do.

Q. And what is that opinion?

A. That opinion is that inasmuch as sarcoid is a systemic process that frequently involves the lungs and is unknown etiology, it is my opinion, based on reasonable medical certainty, that his sarcoid is not directly related to his inhalation of material as part of his occupation. (Tr. 8).

Thus, according to Dr. Rogers, sarcoidosis is most likely due to inhalation of some foreign agents, the identity of which are not known; and according to Dr. Sproul the metals beryllium and zirconium have now been identified as such agents but there is no proof as to other agents.

It is the unanimous opinion of the physicians in this case (with so-called reasonable medical probability or certainty) that the inhalents to which Claimant was subjected at work did not cause his sarcoidosis.

Accepting, for the sake of argument, the admittedly circular reasoning on which these opinions are based they are, in any event, entirely dependant upon the assumed fact that neither beryllium nor zirconium particles were present in the industrial dust inhaled by Claimant. There is, however, no evidence that such is the case; and, under the Section 20 presumption it is Respondents' burden so to demonstrate.

Thus, not only because I doubt that the said opinions can truly be characterized as based on reasonable medical certainty or

probability but, more specifically, because of their dependency on assumed facts not in evidence, I reject said opinions and find that they do not constitute competent evidence in this case.

Furthermore, as to the biopsy of Claimant's lung tissue, it apparently was so specific as to the diagnosis of sardoidosis that no attempt was made to identify the presence of any metallic particles as a causitive agent; nor does it appear that such Particles necessarily could have been detected and identified even if present. (Tr. 112-3).

In short, I find the record to be devoid of substantial evidence on the issue of the specific cause of Claimant's sarcoidosis and conclude that the presumption therefore controls. (Del Vecchio v. Bowers, 296 U.S. 280, 56 S. Ct. 190 (1935)).

Nature and Extent of Disability

Claimant was forced to discontinue his longshore activities on October 13, 1978, due to the combined effects of the sarcoidosis and industrial bronchitis. Within a short time the bronchitis had resolved; it seems reasonable, however that with Claimant's apparent susceptibility to lung disease he should not return to his former "dirty air" work irrespective of his sarcoidosis, which totally precludes such work. At any rate, by November 20, 1978, Claimant's pulmonary functions had returned to a normal state. (Deposition of Dr. J. Cary, M.D., p 173; Ex R-7). Thus beginning November 21, 1978, Claimant's condition having stabilized under an on-going medical regime, his disability became permanent in nature.

I find and conclude therefore that he was temporarily totally disabled from

October 14, 1978 to November 20, 1978, inclusive. He is entitled to be compensated during said period at the rate of $153.59 per week (2/3 of his stipulated average weekly wage of $230.38).

As a result of the effects of his lung disease Claimant is precluded from his former longshore work and is limited to work of a nonvigorous type in a relatively clean air environment. He is 26 years old, has a high school education, is much above average in intelligence, possesses a pleasing personality, has excellent communicative skills and has had experience in retail sales.

Based upon Respondents' vocational testimony I find that there is suitable alternative work available to Claimant in the "expediter" and sales fields in his residential area and that he has a present earning capacity of $200 per week.

I view the vocational testimony given on October 19, 1979, as descriptive of the work then available to Claimant; there is not evidence bearing on the job market at any significantly earlier time. Accordingly, I find and conclude that Claimant's permanent disability was total through October 18, 1979, and that during the period from November 21, I978 to October 18, 1979, inclusive, he was entitled to compensation at the beginning rate of $153.59 per week, subject to adjustments as provided by the Act.

Thereafter, since October 19, 1979, Claimant's disability has been permanent and partial. His average weekly wage prior to injury is stipulated to have been $230.38. Accordingly, his loss of wage-earning capacity presently is $30.38 per week ($230.38 - $200.00); and, his compensation rate is $20.25 (2/3 x $30.38).

Because of the nature of his lung disease it is possible that Claimant's capacity to work may diminish at some time in the future due to a change in his condition. In that event (provided that not more than one year has elapsed from the date of the last payment of compensation) he may apply for modification of the award herein made, under Section 22 of the Act. At present, however, all factors considered, it appears that $200 reasonably represents his earning capacity.

Additional Considerations

(a) Section 12 defense

Respondents have asserted a Section 12 defense based upon Claimant's failure within 30 days after he allegedly became aware of the relationship between his sarcoidosis and his employment, to so notify them; it is anomalous that Respondents make this defense since the principal thrust

of their case is that there is no causal connection between the employment and the sarcoidosis. In any event, no physician has ever advised Claimant that the employment caused the rather esoteric condition. Thus, although Claimant was advised that he had sarcoidosis and that he should not continue in his regular employment, he was never advised that the employment was the cause of the disease. Accordingly, the Section 12 defense fails.

(b) Section 8(f) defense

Respondents have asserted a Section 8(f) defense which, in view of my finding that his condition became permanent only after termination of his employment, and then only as a result of an appropriate course of medical treatment, cannot be entertained. (Jon Victor Jaqua v. Pro-Football, Inc., 8 BRBS 825).

ORDER

1. Respondents shall pay to Claimant compensation for temporary total disability from October 14, 1978 to November 20, 1978, inclusive, at the weekly rate of $153.59.

2. Respondents shall pay to Claimant compensation for permanent total disability for the period from November 21, 1978 to October 18, 1979, inclusive, at the beginning weekly wage of $153.59 subject to adjustments as provided by the Act.

3. Beginning October 19, 1979, and continuing Respondents shall pay to Claimant compensation for permanent partial disability at the weekly rate of $20.25.

4. Credit shall be taken for compensation already paid and all compensation due pursuant to this order shall bear interest at the rate of six percent per annum from the date due until paid.

5. All computations shall be verified by the Deputy Commissioner.

6. Respondent is liable for medical benefits as prescribed by the Act.

STEVEN E. HALPERN
Administrative Law Judge

Dated: November 21, 1979
San Francisco, California

SEH:scm

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ALEXANDER L. STEVAS
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No. 83-1795

In the Supreme Court of the United States

OCTOBER TERM, 1983

TODD PACIFIC SHIPYARDS AND THE AETNA CASUALTY AND SURETY CO., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, AND ELBRIDGE STEVENS, III

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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The judgment of the court of appeals in this civil case was entered on November 9, 1983. A petition for rehearing was denied on January 26, 1984. See Pet. 1. The time provided by 28 U.S.C. 2101(c) within which to file a petition for certiorari therefore expired on April 25, 1984. The petition was not filed until April 26, 1984. The time limit provided by Section 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1984

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